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Evidence - Attorney-Client Privilege - Survival of the Privilege after the Client's Death

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EVIDENCE—ATTORNEY-CLIENT PRIVILEGE—SURVIVAL OF THE PRIVILEGE AFTER THE CLIENT'S DEATH—The United States Supreme Court held that the federal evidentiary attorney-client privilege survives the client's death and therefore protects an attorney's notes taken during a client meeting from discovery by a federal grand jury when the client died shortly after the meeting and the notes are sought because of their relevance to a criminal investigation conducted by the Office of Independent Counsel.

Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998).

Vincent W. Foster, Jr., was Deputy White House Counsel in May of 1993 when the White House fired seven Travel Office employees.[1] The firings created a wave of negative publicity for the White House and sparked congressional and criminal investigations.[2] In July of 1993, Mr. Foster met with attorney James Hamilton from the law firm of Swidler & Berlin[3] to seek legal counsel regarding Mr. Foster's involvement in the

1. Swidler & Berlin v. United States, 118 S. Ct. 2081, 2083 (1998). Mr. Foster, a lifelong friend of President Clinton, was a partner in the Rose Law Firm of Little Rock, Arkansas, before he assumed the duties of Deputy White House Counsel in January of 1993. *See Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation—Washington, DC Phase: Hearings Before the Senate Committee on Banking, Housing, and Urban Affairs*, 103d Cong. 185 (1994) [hereinafter *Madison Guaranty Hearings*]. First Lady Hillary Rodham Clinton was also a partner at the Rose Law Firm. *Id.* The White House Travel Office coordinates the flight arrangements for the members of the media who travel with the President on a regular basis. *See* Ann Devroy and Ruth Marcus, *Clinton Friend's Memo Sought Business; President's Cousin Proposed Staffing Travel Office with Loyalists*, WASH. POST, May 22, 1993, at A1 [hereinafter *Clinton Friend's Memo*]. "According to official White House statements, the employees were dismissed after an audit . . . uncovered 'gross management' and 'shoddy accounting practices.'" H.R. REP. NO. 103-183, at 6. A former Clinton-Gore campaign worker was placed in charge of the Travel Office on an interim basis. *Id.*

2. *See, e.g.*, *Clinton Friend's Memo*, *supra* note 1 (implying that the Travel Office firings were the result of cronyism); *White House Follies: The Gang That Can't Fire Straight*, N.Y. TIMES, May 22, 1993, at 18 (reporting that the White House appeared "inept, callous and self-serving" due to the firings); *Swidler & Berlin*, 118 S. Ct. at 2083 (explaining that the dispute between Swidler & Berlin and the Office of Independent Counsel arose during a criminal investigation of activities that took place during a Congressional investigation of the Travel Office firings).

3. Attorney Hamilton, a 1963 Yale Law School graduate, practices in the areas of government affairs litigation and criminal law. *See* MARTINDALE-HUBBELL LAW DIRECTORY Vol. 4, DC1005B to DC1006B (1998). Attorney Hamilton has written one book and several papers on congressional investigations. *Id.* Swidler & Berlin is a Washington, D.C. law firm of more than 150 attorneys. *Id.* at DC1003B to DC1011B.

Travel Office firings.[4] Attorney Hamilton assured Mr. Foster that their conversation was privileged and took three pages of handwritten notes during a two-hour meeting.[5] Nine days later, Mr. Foster committed suicide.[6] The Office of Independent Counsel ("OIC") subsequently began a criminal investigation to determine whether various individuals obstructed justice during the congressional investigation of the Travel Office firings.[7] In December of 1995, the OIC attempted to discover attorney Hamilton's handwritten notes through a federal grand jury subpoena.[8] In a motion to quash the subpoena, Swidler & Berlin argued

4. *Swidler & Berlin*, 118 S. Ct. at 2083. Mr. Foster was so distressed by the congressional investigation of the Travel Office firings that he suffered an anxiety attack and considered resigning from his position as Deputy White House Counsel. *See* H.R. REP. NO. 104-849, at 187-89.

5. *Swidler & Berlin*, 118 S. Ct. at 2083. "We spoke alone for 2 hours, during which time I took three pages of notes, which are the subject of this litigation here today. Before we began, Mr. Foster asked me if the conversation was privileged and, without hesitation, I said that it was." *See* United States Supreme Court Official Transcript of Oral Arguments, Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998) (No. 97-1192).

6. *Swidler & Berlin*, 118 S. Ct. at 2083. Mr. Foster was found dead from a gunshot wound to the head in Fort Mercy Park, Virginia. *See Madison Guaranty Hearings, supra* note 1, at 182-84. Independent investigations concluded that the cause of Mr. Foster's death was suicide, but many observers continue to question Mr. Foster's motivation for committing suicide. *See Madison Guaranty Hearings, supra* note 1, at 182-379 (discussing speculations of murder but concluding that the cause of Mr. Foster's death was suicide); Reed Irvine and Joe Goulden, *Unremitting Trail of Clues in the Foster Suicide*, WASH. TIMES, Dec. 11, 1993, at D3 (discussing evidence that Mr. Foster's suicide was motivated by his "close relationship with the Clintons" and his concern for their future). A torn up note, found in Mr. Foster's briefcase and believed to be a draft of his opening argument in an imagined Congressional hearing, read, in part, "[n]o one in the White House, to my knowledge, violated any law or standard of conduct, including any action in the travel office. There was no intent to benefit any individual or specific group." *See Madison Guaranty Hearings, supra* note 1, at 189.

7. *Swidler & Berlin*, 118 S. Ct. at 2083. A special division of the judiciary appoints the Independent Counsel, who has the responsibility of investigating possible criminal misconduct by high-level government officials. *See* the Ethics in Government Act, 28 U.S.C. §§ 591-5 99 (1998). Individuals investigated included William Kennedy, Associate Counsel to the President, who was told by Mr. Foster to handle the intial audit of the Travel Office. *See Madison Guaranty Hearings, supra* note 1, at 187.

8. *Swidler & Berlin*, 118 S. Ct. at 2083. A grand jury is generally defined as a "jury of inquiry . . . whose duty is to receive complaints and accusations in criminal cases, hear the evidence adduced on the part of the state, and find bills of indictment in cases where they are satisfied a trial ought to be had." BLACK'S LAW DICTIONARY 855 (6th ed. 1990). "This is called a 'grand jury' because it comprises a greater number of jurors than the ordinary trial jury or 'petit jury.'" *Id.* A federal grand jury consists of "not less than sixteen nor more than twenty-three persons." *Id. See* 18 U.S.C. § 3321 (1998); FED. R. CRIM. P. 6. A subpoena is "a command to appear at a certain time and place to give testimony upon a certain matter." BLACK'S LAW DICTIONARY 1426 (6th ed. 1990). The subpoena referred to in this case was actually a subpoena duces tecum, which is "[a] court process . . . compelling production of certain specific documents and other items, material and relevant to facts in issue in a pending judicial proceeding, which documents and items are in custody and control of person or body served with

that the attorney-client privilege and the work product privilege protected the notes from discovery.[9]

The United States District Court for the District of Columbia examined the notes in camera[10] and determined that both privilege doctrines protected attorney Hamilton's handwritten notes from discovery.[11] The Court of Appeals for the District of Columbia reversed because it found that posthumous breaches of the attorney-client privilege in a criminal context would not have a significant chilling effect on a client's communications with an attorney.[12] The court created a case-by-case balancing test for posthumous application of the attorney-client privilege in criminal matters.[13] Under this balancing test, the trial judge would weigh the extent of the prosecutor's need for privileged documents against the apparent extent of the deceased client's concern for civil liability or reputational damage.[14] The court of appeals determined that a narrow excéption for use only in the "discrete realm"[15] of those criminal

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process." *Id.* *See* FED. R. CRIM. P. 17.

9. *Swidler & Berlin*, 118 S. Ct. at 2083. Attorney-client privilege is a "client's privilege to refuse to disclose and to prevent any other person from disclosing confidential communications between [the client] and [the client's] attorney." BLACK'S LAW DICTIONARY 129 (6th ed. 1990). "Such privilege protects communications between attorney and client made for purpose of furnishing or obtaining professional legal advice or assistance." *Id.* *See* FED. R. EVID. 501. Under the work product privilege, "any notes, working papers, memoranda or similar materials, prepared by an attorney in anticipation of litigation, are protected from discovery." BLACK'S LAW DICTIONARY 1606 (6th ed. 1990). *See* FED. R. CIV. P. 26(b)(3).

10. In camera means "[i]n chambers." BLACK'S LAW DICTIONARY 760 (6th ed. 1990). "A judicial proceeding is said to be heard *in camera* either when the hearing is had before the judge in his private chambers or when all spectators are excluded from the courtroom." *Id.*

11. *Swidler & Berlin*, 118 S. Ct. at 2083.

12. In re Sealed Case, 124 F.3d 230, 232-33 (D.C. Cir. 1997), *rev'd*, 118 S. Ct. 2081 (1998). The circuit court would have remanded the case to the trial judge to redact the portions of attorney Hamilton's notes that reflected the attorney's "mental impressions," thus complying with the work product privilege. *Id.* at 236-37. This case was before Judges Wald, Williams, and Tatel. *Id.* at 231. Judge Williams wrote the opinion for the court, in which Judge Wald joined. *Id.* Judge Tatel wrote a dissenting opinion. *Id.*

13. *Sealed Case*, 124 F.3d at 233-35.

14. *Id.* at 233-34. The court's rather imprecise wording of this balancing test is as follows:

> [I]t is surely true that the risk of post-death revelation will typically trouble the client less than pre-death revelation. The question is how much less, and the answer seems likely to depend on the context. On one side, criminal liability will have ceased altogether. Civil liability, on the other hand, characteristically continues. . . . In the middle are reputational concerns. . . . The costs of protecting communications after death are high. Obviously the death removes the client as a direct source of information. . . . Thus the fewer, and the more questionable the remaining sources (e.g., because of witnesses' interest or bias), the greater the relative value of what the deceased has told his lawyer.

Id. The court of appeals clarified that attorney Hamilton's notes would certainly be protected by the attorney-client privilege if Mr. Foster were still alive. *Id.* at 231.

15. *Id.* at 234.

proceedings that involve the privileged communications of dead clients would not chill a client's disclosures to an attorney.[16]

The Supreme Court of the United States granted certiorari[17] to determine whether the attorney-client privilege, as established under the Federal Rules of Evidence, protects an attorney's notes made during an initial interview with a client when the client subsequently dies and the notes are relevant to a criminal proceeding.[18] Chief Justice Rehnquist wrote the majority opinion, which reversed the circuit court decision.[19]

The Court began its analysis by recognizing that the purpose of an attorney-client privilege is to promote the broad public policy of the administration of justice by encouraging "full and frank communication between attorneys and their clients."[20] Chief Justice Rehnquist wrote that common law principles and "the light of reason and experience" must guide the Court's interpretation of the scope of the attorney-client privilege.[21]

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16. *Id.* "[W]e think that [witness] unavailability through death, coupled with the nonexistence of any client concern for criminal liability after death, creates a discrete realm (use in criminal proceedings after death of the client) where the privilege should not automatically apply." *Id.* "We reject a general balancing test in all but this narrow circumstance." *Id.* "The Court of Appeals also held that the notes were not protected by the work product privilege." *Swidler & Berlin*, 118 S. Ct. at 2084. In the dissenting opinion at the circuit court level, Judge Tatel expressed a practical concern about the court's decision in the following hypothetical caveat that he envisioned an attorney making before a client conference:

> I cannot represent you effectively unless I know everything. I will hold all our conversations in the strictest of confidence. But when you die, I could be forced to testify—against your interests—in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution. Now, please tell me the whole story.

Sealed Case, 124 F.3d at 239 (Tatel, J., dissenting). Judge Tatel feared that clients would not disclose sensitive information following such a caveat, because neither the client nor the attorney would be able to predict whether particular discussions are protected. *Id.*

17. Swidler & Berlin v. United States, 118 S. Ct. 1358 (1998). Certiorari is defined as a "writ of common law origin issued by a superior to an inferior court requiring the latter to produce a certified record of a particular case tried therein." BLACK'S LAW DICTIONARY 228 (6th ed. 1990). The United States Supreme Court "uses the writ of certiorari as a discretionary device to choose the cases it wishes to hear." *Id.*

18. *Swidler & Berlin*, 118 S. Ct. at 2083.

19. *Id.* The Court decided that the attorney-client privilege protected attorney Hamilton's notes from discovery; therefore, it did not reach the question of work product privilege. *Id.* at 2084 n.1. Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer joined Chief Justice Rehnquist in the majority opinion; Justices Scalia and Thomas joined Justice O'Connor in her dissenting opinion. *Id.* at 2083.

20. *Id.* at 2084 (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

21. *Id.* Rule 501 of the Federal Rules of Evidence provides a general rule regarding the existence and scope of privileges. "Except as otherwise required by the Constitution of the United States or provided by Act of Congress . . . the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501.

The Court found a vast body of case law and commentary supporting Swidler & Berlin's position that the attorney-client privilege survived the death of Mr. Foster.[22] In contrast, only one state appellate court expressly allowed a breach of the attorney-client privilege following the client's death, by balancing the interest of justice in seeking truth and the interest of the client in preserving confidentiality.[23] The OIC had the burden of proving that "reason and experience" justified a breach of the attorney-client privilege under the facts of *Swidler & Berlin*, despite the lack of common law authority.[24]

The majority opinion next discussed the testamentary exception to the attorney-client privilege, which permits disclosure of privileged communications following a testator's death if the communications are relevant to litigation between the testator's heirs.[25] The OIC analogized the posthumous termination of the attorney-client privilege in criminal proceedings to this testamentary exception.[26] Chief Justice Rehnquist rejected this argument because the rationale for the testamentary exception in will disputes is based on furthering the client's intent, but testimony in criminal proceedings about privileged documents does not similarly further the client's intent.[27]

The OIC also argued that the proposed narrow exception would have minimal impact on the quality of client communications with attorneys, partly because the mere existence of other exceptions shows that the attorney-client privilege is not absolute.[28] For several reasons, the Court did not agree.[29] First, attorneys cannot explain the scope of confi-

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22. *Swidler & Berlin*, 118 S. Ct. at 2084-86.

23. *Id.* at 2084. The Court noted that even the one case supporting the OIC's position "recognized that the privilege generally survives death, but concluded that it could make an exception where the interest of justice was compelling and the interest of the client in preserving the confidence was insignificant." *Id.* *See* Cohen v. Jenkintown Cab Co., 357 A.2d 689, 692-93 (Pa. Super. 1976).

24. *Swidler & Berlin*, 118 S. Ct. at 2085.

25. *Id.*

26. *Id.*

27. *Id.* at 2086.

28. *Id.* at 2087. Specifically, the OIC listed the testamentary exception and the crime-fraud exception. *Id.* Under the crime-fraud exception, the attorney-client privilege does not protect any communications between an attorney and a client that are made for the purpose of furthering criminal or fraudulent activity. *See Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1509-10 (1985) [hereinafter *Privileged Communications*]. However, "consultations with an attorney after a crime or fraud has taken place remain privileged." *Id.* at 1510.

29. *Swidler & Berlin*, 118 S. Ct. at 2087-88. "The established exceptions are consistent with the purposes of the privilege . . . while a posthumous exception in criminal cases appears at odds with the goals of encouraging full and frank communication and of protecting the client's interests." *Id.* at 2087. *See* Glover v. Patten, 165 U.S. 394, 407-08 (1897) (explaining that the tes-

dentiality to clients under the proposed exception when the attorney cannot foresee the relevance of the discussion to criminal matters.[30] Second, the accumulation of exceptions contributes to the erosion of the attorney-client privilege without the necessary guidance from either common law principles or from "reason and experience."[31] The Court concluded that the OIC did not make a sufficient showing that "reason and experience" require overruling the prevailing common law principle that the attorney-client privilege survived Mr. Foster's death.[32] The OIC was not permitted to see attorney Hamilton's handwritten notes.[33]

In a dissenting opinion, Justice O'Connor focused on the following two consequences of a client's death: (1) a diminished risk that disclosure of privileged information will harm the client; and (2) a heightened urgency for disclosure of privileged information when relevant to criminal proceedings.[34] Justice O'Connor was concerned that posthumous application of the attorney-client privilege may undermine the truth-seeking function of a criminal court by excluding relevant evidence from the fact finder.[35] The dissenting opinion relies on four authorities that the majority found unpersuasive for the proposition that a court's need for relevant evidence after the client's death may trump the client's need for confidentiality.[36]

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tamentary exception is consistent with protecting a client's interests); United States v. Zolin, 491 U.S. 554, 563 (1989) (explaining that the crime-fraud exception is consistent with encouraging open communication of past events).

30. *Swidler & Berlin*, 118 S. Ct. at 2087.

31. *Id.*

32. *Id.* at 2088.

33. *Id.*

34. *Id.* at 2089 (O'Connor, J., dissenting).

35. *Swidler & Berlin*, 118 S. Ct. at 2089 (O'Connor, J., dissenting). "Extreme injustice may occur, for example, where a criminal defendant seeks disclosure of a deceased client's confession to the offense . . . . [T]he paramount value that our criminal justice system places on protecting an innocent defendant should outweigh a deceased client's interest in preserving confidences." *Id.* *See* State v. Macumber, 544 P.2d 1084, 1086 (Ariz. 1976) (holding that an attorney's testimony regarding a now-deceased client's admission to a murder, although tending to exculpate the criminal defendant, is inadmissible).

36. *Swidler & Berlin*, 118 S. Ct. at 2090 (O'Connor, J., dissenting). These sources were as follows: (1) the California Evidence Code, (2) the Pennsylvania case of *Cohen v. Jenkintown Cab Co.*, (3) the proposed *Restatement (Third) of the Law Governing Lawyers*, and (4) a treatise on federal evidence by C. Mueller & L. Kirkpatrick. *Id.* The California Evidence Code terminates the attorney-client privilege when the dead client's estate has been wound up, because "there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged." *See* CAL. EVID. CODE ANN. § 954, comments.

The Pennsylvania case of *Cohen v. Jenkintown Cab Co.* was the sole appellate opinion (other than the D.C. circuit court's opinion in *Swidler & Berlin*) to allow a posthumous breach of the attorney-client privilege outside of the traditional exceptions. *See* Cohen v. Jenkintown Cab Co., 357 A.2d 689 (Pa. Super. 1976). The proposed *Restatement (Third) of the Law Governing*

In addition, the dissenters did not agree with the majority that the prevailing case law clearly stands for the principle that the attorney-client privilege remains absolute after the client's death.[37] The majority opinion acknowledged that the opinions constituting the prevailing case law "presume the privilege survives" without expressly holding that it does so.[38] Justice O'Connor did not propose that the attorney-client privilege automatically cease at the client's death.[39] Rather, she proposed an exception with three conditions precedent: (1) an assertion of the privilege in a criminal case; (2) a showing that the information involved contains "necessary factual information;" and (3) a showing that this factual information is not "otherwise available."[40] If these three elements were met, the trial judge would then weigh the harm of precluding critical evidence against the historically recognized benefit of absolute client confidentiality.[41]

The client's privilege to keep his or her communications with an attorney confidential is ancient and fundamental.[42] Two distinct legal concepts are involved in a discussion of this confidentiality; these are the court's evidentiary rules concerning communications from client to attorney and the attorney's ethical duty to keep client information confidential.[43] The ethical duty is typically expressed in the form of rules for

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Lawyers advises that courts weigh the client's interest in confidentiality against the nature of the litigant's need for the communication on a case-by-case basis to determine if the attorney-client privilege should be breached. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127 cmt. d (Proposed Final Draft No. 1, 1996). However, the *Restatement* recognizes that "no court or legislature has adopted [such a balancing test]." *Id.* Mueller & Kirkpatrick's treatise on federal evidence suggests that in the case of "a deceased client [who] has confessed to criminal acts that are later charged to another, surely the latter's need for evidence sometimes outweighs the interest in preserving the confidences." 2 C. MUELLER & L. KIRKPATRICK, FEDERAL EVIDENCE § 199 (2nd ed. 1994).

37. *Swidler & Berlin*, 118 S. Ct. at 2090 (O'Connor, J., dissenting).

38. *Id.* at 2085. The dissenters rebut, "opinions squarely addressing the posthumous force of the privilege 'are relatively rare.'" *Id.* at 2090 (O'Connor, J., dissenting).

39. *Id.* at 2088-91 (O'Connor, J., dissenting).

40. *Id.* at 2089 (O'Connor, J., dissenting).

41. *Id.* at 2090 (O'Connor, J., dissenting). This exception, complete with the balancing test, is more clearly articulated than is the circuit court's holding below but in essence is the same. *See supra* note 14 for the exact language of the circuit court's test; *Sealed Case*, 124 F.3d at 233-34.

42. 8 JOHN WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2290-2291 (McNaughton rev. ed. 1961). Other relationships that give rise to privileged information are physician-patient, clergy-communicant, husband-wife, parent-child, and relationships in various institutional settings such as journalism and academic research. *See Privileged Communications*, *supra* note 28 (analyzing the history, scope, and justification of the major evidentiary privileges in American law).

43. *See* Brian R. Hood, Note, *The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure After the Death of the Client*, 7 GEO. J. LEGAL ETHICS 741, 745-46 (1994)

professional conduct and, therefore, is not a factor in judicial opinions.[44] The evidentiary privilege is typically expressed in a combination of rules of evidence[45] and common law.[46] In the 1950 case of *United States v. United Shoe Machinery Corp.*,[47] Judge Wyzanski offered the following statute-like definition of the evidentiary attorney-client privilege:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[48]

Legal scholars have traced the evidentiary attorney-client privilege to Roman civil law, and it was firmly established in England by the mid-sixteenth century.[49] The rationale for the creation of such a privilege was attorney oriented; the attorney's code of honor did not allow the attorney to disclose the client's secrets.[50] Today, the rationales often expressed for the attorney-client privilege are client oriented; our adversarial system of justice functions more effectively if clients are assured that their attorneys will not reveal their secrets,[51] and the client's right to privacy outweighs

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(discussing the historically distinct yet practically intertwined evidentiary privilege and ethical duty).

44. *See* Hood, *supra* note 43, at 746 (arguing that "ethical duties should not, in theory, provide a basis for judicial decision making"). The American Bar Association's Model Rules of Professional Conduct prohibit an attorney from "reveal[ing] information relating to representation of a client unless the client consents after consultation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1995).

45. *See, e.g.*, FED. R. EVID. 501 (stating that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience").

46. *See Privileged Communications*, *supra* note 28, at 1458-63, 1470-71 (tracing the development of state and federal evidentiary privileges through judge-made law).

47. 89 F. Supp. 357 (D. Mass. 1950).

48. *United Shoe Machinery Corp.*, 89 F. Supp. at 358-59. Shepardizing this popular passage reveals that it has been cited with approval in at least 79 published opinions of federal district and circuit courts.

49. *See* James A. Gardner, *A Re-Evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279, 288-90 (1963) (explaining the influence of Roman law and the existence of the attorney-client privilege during the reign of Queen Elizabeth I).

50. *See* WIGMORE, *supra* note 42, at § 2290.

51. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (explaining that the purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law

society's need for total historical truth.[52] The practical effect of the evidentiary privilege is to provide an exception to the common law testimonial rule, which requires any person with information relevant to a legal proceeding to testify when called by the court.[53]

The Supreme Court of the United States first expressly recognized the existence of an evidentiary attorney-client privilege in the 1826 case of *Chirac v. Reinicker*.[54] In an opinion by Justice Story, the Court not only affirmed the privilege's existence, it characterized the privilege as "indispensable for the purposes of private justice."[55] The issue before the Court was whether merely identifying an individual as a client of a particular attorney violated the attorney-client privilege.[56] In resolving this issue, Justice Story indicated in dictum that an attorney can never disclose facts related by a client to the attorney.[57] Justice Story concluded that merely establishing an individual as the client of a particular attorney does not violate the attorney-client privilege, but the attorney cannot testify as to the specific claim about which the client was counseled.[58]

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and administration of justice").

52. *See, e.g.*, Hood, *supra* note 43, at 760-61 (listing the client's right to privacy and need for dignity as justifications for an attorney-client privilege).

53. *See* WIGMORE, *supra* note 42, at § 2192.

54. 24 U.S. 280 (1826).

55. *Chirac*, 24 U.S. at 294.

56. *Id.* at 293-94. The facts giving rise to this issue involved two separate lawsuits; the first was an ejectment action brought by the heirs of J.B. Chirac to recover possession of property from its apparent landlord, C.J. Chirac. *Id.* at 280-83. The plaintiffs won possession and then brought a second lawsuit for money damages. *Id.* at 280. In the second lawsuit, George Reinicker claimed to be the true landlord of the property. *Id.* at 292. Reinicker argued that he had not been proven a trespasser because he was not a party to the first suit; therefore, he could not be held liable for money damages. *Id.* at 290-94. The plaintiffs in the second suit rebutted Reinicker's argument by calling as witnesses the defense attorneys from the first suit and asking whether the defense of the first suit had in fact been orchestrated and paid for by Reinicker but using C.J. Chirac as the named party. *Id.* at 294. Counsel for defendant Reinicker in the second suit objected to the question as breaching the attorney-client privilege, and the trial judge sustained the objection. *Id.* The plaintiffs then lost the money damages suit and appealed, among other things, the trial judge's ruling that the attorney-client privilege prevents an attorney from testifying as to the particular claim about which a client was counseled. *Id.* at 293-303. Justice Story affirmed the trial judge's ruling on the privilege issue, but the plaintiffs won a new trial on other grounds. *Id.* at 303.

57. *Id.* at 294. "The general rule is not disputed, that confidential communications between client and attorney, are not to be revealed at any time. . . . Whatever facts, therefore, are communicated by a client to counsel, soley on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent." *Id.*

58. *Id.* at 294-95. Most federal courts still follow the rule that, absent special circumstances, a client's identity is not protected by the attorney-client privilege. *See, e.g.*, Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, 129-30 (9th Cir. 1992); United States v. Levanthal, 961 F.2d 936, 940 (11th Cir. 1992); United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 505 (2d Cir. 1991).

In 1888, the Supreme Court decided *Hunt v. Blackburn*[59] and clarified that the attorney-client privilege belongs to the client alone.[60] Therefore, if the client waives the privilege, the attorney is free to speak about otherwise-confidential matters.[61] The Court held that when a client raises a defense based on the attorney's legal advice, the client waives the attorney-client privilege and loses the right to prevent the attorney's testimony to otherwise-confidential matters.[62]

In the 1897 case of *Glover v. Patten*,[63] the Supreme Court retreated slightly from Justice Story's bold statement in *Chirac* that a client's communications "are not to be revealed at any time" by the client's attorney.[64] In *Glover*, the five daughters of Anastasia Patten disputed their respective amounts of inheritance under their mother's will.[65] When Anastasia's husband, Edmund, died in 1872, Anastasia inherited one half of his estate and their five minor daughters (Mary, Augusta, Josephine, Edith, and Helen) inherited the other half.[66] Anastasia took possession of the entire estate and kept no records concerning expenses incurred for her daughters' benefit.[67] Thirteen years after Edmund's death, Anastasia consulted attorney Curtis Hillyer to prepare a document liquidating the amount owed to each daughter at $101,600.[68] Daughter Augusta received her liquidated payment the night that she married John Glover.[69] The other four daughters subsequently received a payment of $11,250 each, after which Anastasia died.[70]

The daughters discovered that Anastasia had prepared a will after Edmund's death and before the liquidated payments agreement was pre-

59. 128 U.S. 464 (1888).

60. *Hunt*, 128 U.S. at 470.

61. *Id.* The dispute in this case involved an attorney named Weatherford and a rather complicated land transaction, in which Weatherford acquired and sold a piece of land that Weatherford's former client, Blackburn, later made claim to. *Id.* at 465-67. Blackburn claimed that Weatherford gave bad legal advice concerning Blackburn's chances of winning a dispute with a subsequent good-faith purchaser. *Id.* at 467. When Weatherford attempted to testify as to the basis for his advice to Blackburn, Blackburn objected that such information was privileged. *Id.* at 470. The trial judge, in a decision that was later affirmed by the Supreme Court, ruled that Blackburn had waived the attorney-client privilege. *Id.* at 470-71.

62. *Id.* at 470-71.

63. 165 U.S. 394 (1897).

64. *Chirac*, 24 U.S. at 294.

65. *Glover*, 165 U.S. at 395.

66. *Id.*

67. *Id.*

68. *Id.* at 395-96.

69. *Id.* at 397.

70. *Glover*, 165 U.S. at 397.

pared.[71] This will devised Anastasia's estate equally to the five daughters.[72] Daughter Augusta, now with the surname of Glover, claimed that the will extinguished Anastasia's debt to all five daughters under Edmund's will, rendering the liquidated payments agreement meaningless.[73] Under this interpretation, Anastasia's remaining estate would be divided equally among the five daughters, and Mary, Josephine, Edith, and Helen would not be paid the balance they were due under the liquidated payments agreement.[74] Augusta's sisters took exception with this argument; in the subsequent litigation, they asked attorney Hillyer to testify regarding their mother's intent in preparing both the will and the liquidated payments agreement.[75] Augusta argued that the attorney-client privilege prevented attorney Hillyer from testifying as to Anastasia's intent.[76] The lower court permitted attorney Hillyer to testify, and Augusta appealed.[77]

In an opinion written by Justice Brown, the Supreme Court affirmed and recognized for the first time a testamentary exception to the attorney-client privilege.[78] Justice Brown relied on English common law in concluding that a devisee's statements to an attorney regarding the execution of a will or similar document are not protected by the attorney-client privilege in a subsequent dispute between the heirs or next of kin.[79] The Court's rationale depended on a concept of implied waiver of the privilege by the client under such circumstances.[80] A rationale based on waiver of the privilege after the client's death necessarily implies that the privilege survives the client's death.[81]

In *Glover*, Justice Brown notes that several state courts had already

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71. *Id.*
72. *Id.*
73. *Id.* at 398-99.
74. *Id.* at 398-99, 410.
75. *Glover*, 165 U.S. at 400, 406.
76. *Id.* at 406.
77. *Id.* at 400-01.
78. *Id.* at 406-08.
79. *Id.* at 400, 406-08, 413. Justice Brown clarified that the testamentary exception may not apply if the claims against the estate are brought by "third persons" as opposed to heirs. *Id.* at 406. In one of the English cases relied on by the court, Vice Chancellor Turner wrote "That the privilege does not in all cases terminate with the death of the party, I entertain no doubt." *Id.* at 407, quoting Russell v. Jackson, 9 Hare. 387, 68 Eng.Rep. 558 (V.C. 1851). This seems to indicate that, in at least some cases, the privilege does terminate with the death of the client.
80. *Glover*, 165 U.S. at 408. Justice Brown cited *Hunt v. Blackburn* as authority for the waiver concept. *Id; see supra* notes 59-62 and accompanying text for discussion of *Hunt*.
81. *Swidler & Berlin*, 118 S. Ct. at 2085. *See* John Doe Grand Jury Investigation, 562 N.E.2d 69 (Mass. 1990) (explaining that "[i]f the privilege were to end upon the death of the client, there would be nothing for the executor or administrator to waive").

recognized the testamentary rule as an exception to state evidentiary rules regarding the attorney-client privilege.[82] Federal courts have always been interested in the status of state court privilege rules.[83] Before Congress adopted the Federal Rules of Evidence in 1973, federal courts frequently applied state evidentiary statutes to privilege matters in civil cases.[84] The 1938 Federal Rules of Civil Procedure required federal courts to consider state court evidentiary rules when reviewing issues concerning the admissibility of evidence.[85] Similarly, the 1946 Federal Rules of Criminal Procedure required federal courts to determine privilege matters "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[86] Thus, until the Federal Rules of Evidence were enacted in 1973, federal courts applied state evidentiary rules for civil cases and attempted to develop a body of federal common law to resolve evidentiary issues in criminal cases.[87]

In the century between the 1897 *Glover* decision, in which the United States Supreme Court first recognized the testamentary exception, and the 1998 *Swidler & Berlin* decision, many state supreme courts and commentators recognized a general rule under which the attorney-client privilege survived the client's death.[88] The vast majority of these state court decisions involved the testamentary exception, which by its

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82. *Glover*, 165 U.S. at 408. The four states were Minnesota, Illinois, Missouri, and Connecticut. *Id.*

83. *See Privileged Communications*, *supra* note 28, at 1463.

84. *Id.*

85. *Id. See* FED. R. CIV. P. 43(a) (1938) (amended 1975), which stated, in part, that "[a]ll evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States[,] . . . or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held."

86. FED. R. CRIM. P. 26 (1945) (amended 1975). This rule codified the holding of Wolfle v. United States, 291 U.S. 7 (1934). *See Wolfle*, 291 U.S. at 12; *Privileged Communications*, *supra* note 28, at 1464.

87. *Privileged Communications*, *supra* note 28, at 1464-65.

88. *See, e.g.*, Morris v. Cain, 1 So. 797 (La. 1887); Peyton v. Werhane, 11 A.2d 800 (Conn. 1940); Martin v. Shaen, 156 P.2d 681 (Wash. 1945); Bailey v. Chicago, Burlington and Quincy R.R. Co., 179 N.W.2d 560 (Iowa 1970); State v. Macumber, 544 P.2d 1084 (Ariz. 1976); Mehus v. Thompson, 266 N.W.2d 920 (N.D. 1978); State v. Doster, 284 S.E.2d 218 (S.C. 1981); In re John Doe Grand Jury Investigation, 562 N.E.2d 69 (Mass. 1990); People v. Modzelewski, 203 A.D.2d 594 (N.Y. 1994); Mayberry v. Indiana, 670 N.E.2d 1262 (Ind. 1996). *See generally* CHARLES MCCORMICK, MCCORMICK ON EVIDENCE, § 94 (John William Strong ed., 4th ed. 1992) (stating that "[t]he accepted theory is that the protection afforded by the privilege will in general survive the death of the client"); WIGMORE, *supra* note 42, at § 2323 (summarizing that "the privilege continues even after the *end of the litigation* . . . and even after the *death of the client*") (emphasis in original).

very existence implies the survival of the privilege.[89] The often-expressed rationale for the testamentary exception was a waiver theory; the decedent's representative can waive the privilege if necessary to learn the decedent's testamentary intent, especially if waiving the privilege will not adversely effect the decedent's reputation.[90]

An example of a decision involving posthumous application of the attorney-client privilege but not involving the testamentary exception is the 1970 Iowa case of *Bailey v. Chicago, Burlington and Quincy Railroad Co.*[91] In this case, the defendant's train collided with a car driven by Bailey's wife, killing her instantly.[92] Bailey brought a wrongful death action in Iowa state court against the railroad, claiming that the railroad caused his wife's death.[93] Bailey then filed a pretrial motion in limine,[94] requesting the trial court to rule that any evidence related to the fact that his wife had filed for divorce one year before the accident be inadmissible.[95] The trial court granted Bailey's motion.[96]

At the trial, the defendant railroad called as a witness attorney Ward Reynoldson, who had counseled Bailey's wife regarding her divorce action.[97] Over Bailey's privilege objection, the trial judge allowed attorney Reynoldson to divulge the confidential communications made by Bailey's wife during her divorce consultations.[98] The jury found for the defendant railroad, and the plaintiff appealed.[99] In addition to two procedural issues before the Iowa Supreme Court was the third question of whether the attorney-client privilege prevented attorney Reynoldson from testifying as

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89. *Swidler & Berlin*, 118 S. Ct. at 2085.

90. *See, e.g.*, Martin v. Shaen, 156 P.2d 681, 684 (Wash. 1945) (outlining the general rule that the personal representative of the deceased client may waive the attorney-client privilege in a will dispute only if such waiver would not adversely effect the deceased client's reputation).

91. 179 N.W.2d 560 (Iowa 1970).

92. *Bailey*, 179 N.W.2d at 561.

93. *Id.*

94. A motion in limine is "a pretrial motion requesting court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to moving party that curative instructions cannot prevent predispositional effect on jury." BLACK'S LAW DICTIONARY 1013 (6th ed. 1990). "Purpose of such motion is to avoid injection into trial of matters which are irrelevant, inadmissible and prejudicial . . . ." *Id.*

95. *Bailey*, 179 N.W.2d at 561-62. Bailey's wife was divorcing him, in part, because "the hired man's wife had five children, the father of the last two being [Bailey]." *Id.* at 563. Presumably Bailey thought it bad trial strategy when suing the railroad for damages resulting from his wife's death to allow the jury to learn of his marital infidelity, illegitimate children, and pending divorce.

96. *Id.* at 562.

97. *Id.*

98. *Id.*

99. *Id.* at 561.

to Bailey's wife's communications regarding her divorce action.[100]

The Iowa Supreme Court expressly ruled that the attorney-client privilege, unless waived by the client, lives forever.[101] According to the *Bailey* Court, this rule applies regardless of any change in the attorney-client relationship, including the client's death.[102] The court held that the trial judge erred in overruling Bailey's objections to attorney Reynoldson's testimony and remanded the case for a new trial.[103] The court's rationale was that disclosure by the attorney of privileged information regarding a deceased client could still harm the client or the client's estate.[104] The court also made a rare reference to the American Bar Association ("ABA") Code of Responsibility and the corresponding ethical duty of confidentiality.[105] The rule cited by the *Bailey* Court was from the 1969 ABA Model Code of Professional Responsibility, which mandated that "a lawyer shall not knowingly reveal a confidence or secret of his client"[106] and clarified that this obligation "continues after the termination of [the lawyer's] employment."[107]

The 1969 ABA Model Code was superseded by the 1983 ABA Model Rules of Professional Conduct.[108] Rule 1.6 of the 1983 Model Rules governs client confidentiality[109] and is generally regarded as allowing even less disclosure than did its 1969 counterpart.[110] Today, the ABA

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100. *Bailey*, 179 N.W.2d at 562. One of the two procedural questions on appeal involved the plaintiff's claim that the trial judge failed to rule on the plaintiff's "application for adjudication of law points." *Id.* The second procedural question on appeal involved the plaintiff's claim that the trial judge failed to fully rule on the plaintiff's pretrial motion in limine regarding the exclusion of evidence of the pending divorce action. *Id.* The Iowa Supreme Court held that the application for adjudication of law points claim had no merit but that the motion in limine claim had some merit and was to be considered by the trial judge on remand. *Id.* at 562-63.

101. *Id.* at 564.

102. *Id.* (quoting 8 JOHN WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2323 (McNaughton rev. ed. 1961)).

103. *Id.* at 565.

104. *Id.* at 564.

105. *Bailey*, 179 N.W.2d at 565. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 notes (1969). The American Bar Association has produced rules of professional ethics for attorneys since 1908. *See* Hood, *supra* note 43, at 750; ABA CANONS OF PROFESSIONAL ETHICS (1908).

106. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (1969). An attorney who failed to meet Rule 4-101(B) was subject to disciplinary action. *See* Hood, *supra* note 43, at 754 n.64; MODEL CODE OF PROFESSIONAL RESPONSIBILITY preliminary statement (1969).

107. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-6 (1969).

108. Hood, *supra* note 43, at 752.

109. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983). This rule prohibits an attorney from "reveal[ing] information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." *Id.*

110. Hood, *supra* note 43, at 753-54.

Model Rules impose a very broad and deep duty on attorneys to protect their clients' confidentiality.

Shortly after the ABA updated the 1908 Canons with the 1969 Model Code, the Supreme Court (prompted by the ABA) promulgated the Federal Rules of Evidence.[111] The 1972 proposed Federal Rules of Evidence expressly recognized, among eight other privileges, the attorney-client privilege.[112] These controversial privilege rules in the proposed Federal Rules of Evidence called for an end to both federal common law development of privileges and federal court application of state evidentiary rules.[113]

Because of sharp criticism of the express privileges in the proposed Federal Rules of Evidence, Congress deleted them and substituted a rule very similar to the stance taken in the 1946 Federal Rules of Criminal Procedure.[114] Under Rule 501 of the Federal Rules of Evidence, federal courts are to determine the scope of a witness's privilege according to "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[115] Therefore, Rule 501 allows the federal courts to develop a body of federal common law regarding privileges.[116] Federal courts rely on state privilege rules as persuasive precedent and are required to apply the state rule in most diversity jurisdiction cases.[117] In cases such as *Swidler & Berlin*, the Supreme Court determines the prevailing view under state common law before creating new federal common law for evidentiary matters.[118]

The majority opinion in *Swidler & Berlin* found that the prevailing view under state common law supported absolute nondisclosure by attorney Hamilton.[119] The Court found only one state appellate court decision supporting the OIC's argument for breaching the attorney-client privilege after the client has died in circumstances other than the traditional ex-

111. *See Privileged Communications*, *supra* note 28, at 1465.

112. *Id.*

113. *Id.* at 1465-66; *see also supra* note 87 and accompanying text.

114. *Id.* at 1469; *see also supra* note 86 and accompanying text.

115. FED. R. EVID. 501.

116. *See Privileged Communications*, *supra* note 28, at 1470-71; Trammel v. United States, 445 U.S. 40, 47 (1980) (explaining that Rule 501 permits courts to develop privilege law on a "case-by-case basis").

117. *See Privileged Communications*, *supra* note 28, at 1470. Rule 501 states that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness... shall be determined in accordance with State law." FED. R. EVID. 501.

118. Swidler & Berlin v. United States, 118 S. Ct. 2081, 2084-85 (1998).

119. *Swidler & Berlin*, 118 S. Ct. at 2084-85.

ceptions.[120] That case is *Cohen v. Jenkintown Cab Co.*, a 1976 opinion from Pennsylvania's intermediate appellate court.[121] In *Cohen*, a pedestrian (Claire Cohen) was struck by a cab driven by an employee of Jenkintown Cab Company (Edward Guise).[122] Guise lied to the police (and to Cohen) concerning his involvement, claiming to have merely witnessed the accident.[123] The Cohens collected $30,00 from their insurance company because Guise repeated his lie at an insurance arbitration hearing.[124]

Subsequently, Cohen's attorney began to suspect that Guise was, in fact, the driver who had struck Cohen and not a mere witness.[125] The Cohens contemplated a civil suit against Jenkintown Cab Company and deposed Guise's attorney, Charles Gross.[126] At the deposition, attorney Gross stated that Guise "admitted to having been the driver of the car [that] struck Mrs. Cohen."[127] The Cohens sued Jenkintown Cab Company, and when the Cohens sought to admit evidence of the confidential communication from Guise to attorney Gross, both the cab company and Guise's widow objected on the grounds that the admission was protected by the attorney-client privilege.[128] The trial judge sustained the defendant's objection, and with very little other evidence to support the plaintiff's claim, the jury found for Jenkintown Cab Company.[129]

The issue on appeal was whether the jury was entitled to learn about the confidential admission by Guise to attorney Gross when the Cohens had no other evidence with which to establish their case, Guise was deceased and therefore not subject to criminal actions, and Guise had no estate to be joined as a third-party defendant to the civil suit.[130] The ap-

120. *Id.* at 2084.

121. Cohen v. Jenkintown Cab Co., 357 A.2d 689 (Pa. Super. 1976).

122. *Cohen*, 357 A.2d at 690-91. Cohen was seriously injured by the accident and had little or no recollection of the circumstances surrounding the accident. *Id.* at 690, 693. There were no eyewitnesses. *Id.* at 693.

123. *Id.* at 690-91. Guise told the police that "a dark-colored, hit-and-run vehicle" had struck Cohen. *Id.* at 690. Guise was responsible for two previous accidents while employed by Jenkintown and had been warned that a third accident would end his career as a cab driver. *Id.* at 693 n.3.

124. *Id.* at 690.

125. *Id.*

126. *Id.* at 690-91.

127. *Cohen*, 357 A.2d at 690-91. Guise made this admission to attorney Gross during a consultation prior to the arbitration hearing. *Id.* at 691. Attorney Gross advised Guise to either tell the truth or take the Fifth Amendment at the arbitration hearing. *Id.*

128. *Id.* at 691. Apparently Guise died at some point between the insurance arbitration hearing and the trial; therefore, his widow asserted the privilege on his behalf.

129. *Id.* at 691, 693.

130. *Id.* at 691-94.

pellate court held that the only modern purpose for an attorney-client privilege is "to aid in the administration of justice" and that under these facts the privilege was frustrating the administration of justice.[131] The court also cautioned trial judges who might exercise this rule in the future to "resolve all doubt in favor of non-disclosure, so that a client should not be chagrined to learn that the confidences that he conveyed to his attorney have been revealed to his detriment and without his consent."[132]

A scenario discussed by commentators in which the administration of justice is clearly and tragically frustrated by the existence of the attorney-client privilege involves an attorney who knows that a convicted criminal defendant is innocent.[133] If this knowledge is based on confidential client communications to the attorney, then the attorney-client privilege bars the attorney from exonerating the innocent person, even if the client died after making the admission.[134] This was precisely the concern of the dissenting Justice O'Connor in *Swidler & Berlin*,[135] and it was precisely the facts before the Arizona Supreme Court in the 1976 case of *State v. Macumber*.[136]

In 1974, William Macumber's estranged wife reported to the police that her husband had recently admitted to committing a twelve-year-old double murder that until then had stumped the police.[137] Macumber admitted to the police "that he had told his wife that he had killed the two victims."[138] Macumber was accused and convicted of two counts of first-degree murder.[139] At his trial, Macumber produced as witnesses two at-

131. *Id.* at 693-94. It was also important to the court that the disclosure of Guise's admission was unlikely to harm Guise's interests or reputation. *Id.* at 693.

132. *Cohen*, 357 A.2d at 694. The court did not explain how a dead client would learn that an attorney had disclosed confidential information.

133. *See* Hood, *supra* note 43, at 741-42. Hood begins his article on Rule 1.6 of the ABA Model Rules of Professional Conduct with a fictional account of a troubled criminal defense attorney who knows that an innocent man has been convicted of murder and executed. *Id.* The attorney did nothing to prevent the execution because her knowledge is based on a previous client's confidential admission, although the previous client has subsequently died. *Id.*

134. *Id.* at 741-43.

135. *Swidler & Berlin*, 118 S. Ct. at 2088-91 (O'Connor, J., dissenting).

136. 544 P.2d 1084 (Ariz. 1976) (reversing conviction and remanding for new trial) [hereinafter *Macumber I*]; State v. Macumber, 582 P.2d 162 (Ariz. 1978) (affirming conviction after second trial) [hereinafter *Macumber II*].

137. *Macumber II*, 582 P.2d at 164. The bodies of an engaged couple were found lying next to their car in May of 1962. *Id.* The police recovered from the crime scene "four expended .45-caliber shell casings and one live .45-caliber round," as well as fingerprints from the car. *Id.* For the next twelve years, until Macumber's name surfaced, the police had no leads. *Id.*

138. *Id.* at 164.

139. *Macumber I*, 544 P.2d at 1085. Macumber "was sentenced to serve two concurrent terms of life imprisonment." *Id.*

torneys who were prepared to testify that some years earlier, one Ernest Valenzuela, now dead, had admitted to committing the dual murders that Macumber was now accused of committing.[140] The trial judge raised Valenzuela's attorney-client privilege sua sponte[141] and refused to allow the two attorneys to testify.[142] The Arizona Supreme Court affirmed the trial court's decision to exclude the attorneys' testimony on the basis of the attorney-client privilege.[143] The court's succinct rationale was that the scope of Arizona's attorney-client privilege was provided in a state statute, which did not provide an exception to the general rule that the privilege does not end at the client's death.[144]

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140. *Id.* at 1086-87; *Macumber II*, 582 P.2d at 166. Both attorneys had represented Valenzuela in an unrelated 1968 murder charge. *Macumber I*, 544 P.2d at 1087. When the two attorneys learned that Macumber had been accused of the dual murder that Valenzuela had claimed to have committed, the attorneys asked the Arizona Bar's Committee on Ethics for advice. *Id.* The ethics committee advised the attorneys to disclose their information to the prosecution and to the defense in Macumber's trial. *Id.* However, the trial judge did not share the ethics committee's opinion that the attorney-client privilege did not prevent the disclosure of this evidence to the jury. *Id.*

141. Sua sponte means "of [the court's] own will or motion; voluntarily; without prompting or suggestion." BLACK'S LAW DICTIONARY 1424 (6th ed. 1990).

142. *Macumber I*, 544 P.2d at 1086.

143. *Id.* Macumber did win a new trial, however, because the trial judge erroneously excluded testimony from an expert who was prepared to testify that the .45-caliber shell casings found at the scene could have been fired from weapons other than Macumber's .45-caliber pistol. *Id.* at 1085-87. Macumber's defense the second time around centered on an alleged conspiracy by his estranged wife and the police to tamper with evidence and commit perjury in order to see Macumber convicted. *Macumber II*, 582 P.2d at 164-65, 168-69. At the second trial, the judge permitted a full hearing about the proposed testimony of the two attorneys and two psychiatrists regarding Valenzuela's admissions. *Id.* at 166-67. The trial judge found that, in addition to the privilege problems, the proposed testimony lacked "sufficient circumstantial probability of trustworthiness . . . to justify . . . admission into evidence." *Id.* at 167. The Arizona Supreme Court upheld that ruling and affirmed Macumber's second conviction for the double murder. *Id.* at 170. Macumber continues to serve his life sentence in an Arizona prison, where he has self-published a book on Arizona history. *See* Clint Williams, *One Exclusive Boutique Shop Sells Inmates' Crafts*, THE ARIZONA REPUBLIC, Nov. 19, 1995, at B1.

144. *Macumber I*, 544 P.2d at 1086. The court presumed that the state legislature had weighed the possibility that the attorney-client privilege might hamper justice before enacting the statute. *Id.*

[tab]In a concurring opinion, Justice Holohan argued for admission of the attorneys' testimony as reliable hearsay declarations against penal interest. *Id.* at 1087-88 (Holohan, J., concurring). Hearsay is "testimony in court of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." BLACK'S LAW DICTIONARY 722 (6th ed. 1990). "The very nature of the evidence shows its weakness, and, as such, hearsay evidence is generally inadmissible unless it falls within one of the many exceptions which provides for admissibility." *Id.* A declaration against penal interest is "[a]n out of court statement by a declarant who is unavailable as a witness [and] is admissible as an exception to the rule against hearsay if the statement was against [the declarant's] interest at the time it was made." *Id.*

Justice Holohan argued that, under *Chambers v. Mississippi*, a criminal defendant's con-

The *Macumber* case is one of the few appellate court decisions prior to *Swidler & Berlin* that concerned the posthumous application of attorney-client privilege in the criminal arena.[145] Another such criminal case, the facts of which parallel those of *Swidler & Berlin*, is the 1990 Massachusetts case of *John Doe Grand Jury Investigation*.[146] In this case, a state prosecutor sought the testimony of attorney John Dawley before a grand jury regarding attorney Dawley's conference with a client.[147] The grand jury was investigating attorney Dawley's client, Charles Stuart, and several other people for the deaths of Carol DiMaiti Stuart and her son, Christopher Stuart.[148] The day after his conference with attorney Dawley, Charles Stuart jumped off the Tobin Bridge, killing himself.[149] The trial court judge, purporting to act under Massachusetts state law, reported the question to the court of appeals, and the Supreme Judicial Court of Massachusetts then transferred the matter to itself.[150]

The Massachusetts Supreme Judicial Court noted that the attorney-client privilege often frustrates society's need for full disclosure of all relevant information but held that the benefit of the privilege to clients outweighs the burden to society.[151] The court expressly held that the attorney-client privilege survives the client's death and relied on the existence of a testamentary exception as circumstantial evidence in support of this conclusion.[152] The court reviewed and rejected the balancing test applied

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stitutional right to due process is violated if a state's rules of evidence preclude the admission of evidence that fits an exception to the hearsay rule, if that evidence is offered to exculpate the defendant. *Macumber I*, 544 P.2d at 1088 (Holohan, J., concurring). *See* Chambers v. Mississippi, 410 U.S. 284 (1973). Because Valenzuela's admissions fit the declarations against penal interest exception to the hearsay rule, Justice Holohan would have allowed the two attorneys to testify at Macumber's trial. *Macumber I*, 544 P.2d at 1088 (Holohan, J., concurring).

145. *Swidler & Berlin*, 118 S. Ct. at 2085.

146. 562 N.E.2d 69 (Mass. 1990).

147. *John Doe*, 562 N.E.2d at 69.

148. *Id. See also* Judy Rakowsky, *Bennett's Relatives Settle Suit with City*, THE BOSTON GLOBE, Oct. 31, 1995, at 23. Carol DiMaiti Stuart was Charles' wife and was pregnant with Christopher when she was shot. *Id.* Charles Stuart claimed that a black man had shot him and his wife, and the Boston police began investigating William Bennett as a suspect in the shootings. *Id.* The activities of the Boston police during that investigation prompted subsequent civil rights litigation by the Bennett family. *Id.*

149. *John Doe*, 562 N.E.2d at 69; *see also* Rakowsky, *supra* note 148. Charles Stuart was aware that his brother Matthew told the Boston police that Matthew disposed of the gun after Charles shot and killed Carol. *See* John Ellement, *Judge Returns Matthew Stuart to Prison*, THE BOSTON GLOBE, May 29, 1997, at B2. Realizing that he was now implicated in the crime, Charles killed himself. *Id.* Within hours of Charles' suicide, CBS secured the rights to the Stuart murder story and subsequently aired a TV movie in the fall of 1990, before the grand jury issued a final verdict. *See* Joseph P. Kahn, *Chuck Wagon*, THE BOSTON GLOBE, Jan. 1, 1991, at 52.

150. *John Doe*, 562 N.E.2d at 69.

151. *Id.* at 70.

152. *Id.*

by the Pennsylvania intermediate appellate court in *Cohen*.[153] The *John Doe* Court indicated that the only situation in which it could foresee permitting a breach of the attorney-client privilege would be "where [the breach is] mandated by constitutional considerations."[154]

The constitutional consideration raised by the *John Doe* Court is the same concern raised by Justice O'Connor in the dissenting opinion of *Swidler & Berlin*.[155] The issue is whether the mechanical application of the evidentiary rule excluding privileged information violates a criminal defendant's constitutional due process rights when the privileged information is the only exculpating evidence available to the defendant and the holder of the privilege is dead. However, the facts of *Swidler & Berlin* (and the facts of *John Doe*) do not squarely raise that issue; there is another line of cases available to a criminal defendant in such a predicament.

In *Chambers v. Mississippi*,[156] the United States Supreme Court held that the mechanical application of the evidentiary rule excluding hearsay violates a criminal defendant's constitutional due process rights when the hearsay bears "persuasive assurances of trustworthiness" and is the only exculpating evidence available to the defendant.[157] When the only exculpating evidence available to a criminal defendant is inadmissible as a result of the posthumous application of the attorney-client privilege, the defendant could argue for an expansion of *Chambers* into evidentiary issues other than hearsay.[158] Therefore, Justice O'Connor's very real concern is addressed by a different line of cases, without disturbing the apparently unbending rule as articulated by Chief Justice Rehnquist.

Swidler & Berlin did not squarely raise a *Chambers* issue because the purpose of the evidence sought was not to exculpate a defendant in a criminal trial. Rather, the OIC sought attorney Hamilton's notes for the purpose of determining, through a grand jury, whether sufficient evidence existed to pursue criminal actions against certain high-ranking members of the executive department.[159] Factually, this raises an inter-

153. *Id.* at 71; *see supra* notes 121-32 and accompanying text.

154. *Id.* at 71-72.

155. *Swidler & Berlin*, 118 S. Ct. at 2089 (O'Connor, J., dissenting).

156. 410 U.S. 284 (1973).

157. *Chambers*, 410 U.S. at 302.

158. State v. Macumber, 544 P.2d 1084, 1088 (Ariz. 1976) (Holohan, J., concurring). Justice Holohan's concurring opinion discussed such a strategy and broadly stated the holding of *Chambers* to be that "[a] state's rules of evidence cannot deny an accused's right to present a proper defense." *Macumber*, 544 P.2d at 1088. *See supra* note 144.

159. *Swidler & Berlin*, 118 S. Ct. at 2083. As part of its overall investigation of possible wrongdoing by President Clinton, the OIC also sought information from Deputy White House Counsel Bruce Lindsay and from officers of the United States Secret Service. *See* Verbatim

esting parallel between *Swidler & Berlin* and the 1974 case of *United States v. Nixon*.[160] Both cases involved independent prosecutors seeking information concerning potential criminal activity at the highest levels of the executive department. Both cases involved claims by the holders of the information that its disclosure was barred by an evidentiary privilege. Both cases arose in the early stages of a string of events that had the potential to end in the impeachment of a president.[161] In *Nixon*, the Supreme Court recognized the importance of an executive privilege but held that sometimes the judiciary's need to administer justice (especially in the criminal arena) will trump the evidentiary privilege.[162] In *Swidler & Berlin*, the Supreme Court was unwilling to similarly set aside the attorney-client privilege. The two privileges differ in purpose and history; it is not surprising that they differ in scope as well.

If anything is surprising about *Swidler & Berlin*, it is the rather broad nature of Chief Justice Rehnquist's opinion, considering the narrow factual events giving rise to the legal issue. Perhaps it would have been more appropriate for the Court to expressly limit its holding to situations in which a grand jury is seeking relevant but allegedly privileged information to determine whether a criminal prosecution should go forward and the holder of the privilege is dead. In such cases, if an in camera review con-

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Transcript of Independent Counsel Kenneth Starr's Prepared Testimony for Delivery Before the House Judiciary Committee, 1998 WL 801023 (November 19, 1998) [hereinafter *Starr's Testimony*]. The White House claimed that both of these matters involved privileged information, and the OIC had to litigate the privilege issues in order to get the allegedly privileged information before the federal grand jury. *See* In re Lindsey, 148 F.3d 1100 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 466 (1998) (holding that the attorney-client privilege does not prevent a government attorney from testifying before a federal grand jury regarding the possible commission of a federal crime); In re Sealed Case, 148 F.3d 1073 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 461 (1998) (holding that no evidentiary privilege prevents members of the Secret Service from testifying before a federal grand jury regarding the possible commission of a federal crime).

160. 418 U.S. 683 (1974). President Richard Nixon attempted to quash a subpeona duces tecum requiring the production of, among other things, tape recordings of meetings between President Nixon and others for review by a grand jury. *Nixon*, 418 U.S. at 687-88. For definitions of subpeona duces tecum and grand jury, *see supra* note 8. President Nixon had not been indicted by the grand jury, but he was named as an "unindicted coconspirator." *Id.* at 687. President Nixon argued that an absolute executive privilege prevented disclosure of the tapes and, alternatively, that a qualified executive privilege prevailed over the subpeona duces tecum. *Id.* at 703. The Supreme Court held that the executive branch did not have an absolute privilege to withhold relevant information, and that the general interest in confidentiality as expressed by President Nixon was insufficient to overcome "the demonstrated, specific need for evidence in a pending criminal trial." *Id.* at 713.

161. *See* Juliet Eilperin & Peter Baker, *GOP Proposes Wide-Ranging Clinton Inquiry; Plan Modeled on Watergate Rules*, WASH. POST, Oct. 1, 1998, at AO1. The OIC later announced that the Travel Office investigation would not be relevant to the House of Representative's impeachment inquiry of President Clinton. *See Starr's Testimony*, *supra* note 159.

162. *Nixon*, 418 U.S. at 712-13.

firms that the information is part of a confidential disclosure made by a client to an attorney while the attorney was providing legal counsel, the client's privilege of nondisclosure survives the client's death. Such a rule would clearly leave open the possibility of a different result when the information is sought during a criminal prosecution rather than during a criminal investigation.[163]

The holding of *Swidler & Berlin* appears to be much broader. The majority is unwilling to overturn the prevailing common law rule that the attorney-client privilege survives the client's death until the "light of reason and experience" shows that such a breach will not thwart the historic purposes of the privilege.[164] Undoubtedly, the majority desired to articulate a bold, clear rule in order to promote certainty in a lawyer's explanation of the attorney-client privilege to a client. This certainty allows both attorneys and clients to confidently rely on the evidentiary attorney-client privilege. The confidentiality that exists between an attorney and a client dictates not just the attorney's relationship with the client, but also that attorney's relationships with the court and with third parties.[165] Privileges are more than exclusionary rules of evidence, they are in essence part of a person's property-like right to privacy.[166] It will be possible for the Supreme Court to limit *Swidler & Berlin* to its facts in the future if the Court finds it necessary to do so. In the meantime, attorneys have a clear evidentiary rule in the federal realm that comports with every attorney's ethical duty to keep quiet about client confidences, even after the client has died.

James F. Glunt

163. A footnote in the majority opinion clarifies that the facts of this case do not present "exceptional circumstances implicating a criminal defendant's constitutional rights." *Swidler & Berlin*, 118 S. Ct. at 2087 n.3. This mere footnote has given hope to those who support a balancing test in privilege cases involving dead clients. *See* Steve France, *"Weighty Reasons" for Secrecy*, 84 A.B.A. J. 44 (Aug. 1998) (quoting Professor Charles Wolfram, the chief reporter for the American Law Institute's *Restatement of the Law Governing Lawyers*, as suggesting that footnote 3 prevents *Swidler & Berlin* from being a "devastating blow to critics of an absolute privilege").

164. *Swidler & Berlin*, 118 S. Ct. at 2088.

165. *See* Hood, *supra* note 43, at 744 (explaining the importance of the attorney-client privilege in the public's view of the legal profession).

166. *See* David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL .L. REV. 101, 110-11 (1956) (arguing that "[p]rimarily [privileges] are a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the state's coercive or supervisory powers and from the nuisance of its eavesdropping. Even when thrown into the lap of litigation, they are not the property of the adversaries as such; even in litigation, they may be exclusively the property of perfectly natural persons who wish to preserve despite litigation, just as they preserved prior to litigation, their right to be left alone in their confidences").